NO. 91-458

In the Supreme Court of the United States

OCTOBER TERM, 1991

RIVERSIDE MARKET LIMITED PARTNERSHIP, ET AL.,
(Philip C. Witter; Gordon H. Kolb; Hirschel T. Abbott, Jr.; Philip Gensler, Jr.; George G. Villere; G. Walter Loewembaum; Lillian Shaw Loewembaum; Leon T. Reymond, Jr.; George V. Young; Michael R. Schneider)

Petitioner

VS.

T. GENE PRESCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I.

WHETHER THE COURT OF APPEALS OF THE FIFTH CIRCUIT ERRED IN UPHOLDING THE GRANT OF SUMMARY JUDGMENT WHEN, IN CONFLICT WITH THE EIGHTH AND SECOND CIRCUIT PRECEDENTS, IT REASONED THAT THE MAJORITY STOCKHOLDER AND ACTIVE MANAGER OF A CORPORATION CANNOT BE HELD LIABLE AS AN "OWNER OR OPERATOR" FOR THE BUSINESS' IMPROPER DISPOSAL OF HAZARDOUS WASTE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq.?

II.

IN ENACTING CERCLA, DID CONGRESS INTEND THAT SHAREHOLDERS, OFFICERS, AND DIRECTORS OF A CORPORATION WHO ACTIVELY PARTICIPATED IN THE MANAGEMENT AND EFFECTIVELY CONTROLLED THE OPERATIONS OF THE CORPORATION, SHOULD ESCAPE LIABILITY ON THE GROUNDS THAT ONLY THE CORPORATION, AND NOT THE INDIVIDUALS ACTING ON BEHALF OF THE CORPORATION, COULD BE HELD LIABLE AS OWNERS AND OPERATORS?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Riverside Market Development Corp., et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding May 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 931 F.2d 327 (5th Cir. 1991) and is reprinted in the appendix, p. App. 1-16, infra.

The opinion of the United States District Court for the Eastern District of Louisiana (Wicker, D.J.) is reported at 1990 WL 72249 (E.D.La. May, 23, 1990) and is reprinted in the appendix, p. App. 17-42, infra.

JURISDICTION

Invoking federal question jurisdiction, Petitioner brought this suit pursuant to 28 U.S.C. § 1331 and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq., as amended, against a corporation, International Building Products ("IBP"), and two individuals, T. Gene Prescott ("Prescott") and Gerard von Dohlen ("von Dohlen"). Appended to the suit were several state law claims that are irrelevant to these proceedings. Von Dohlen and Prescott filed a Motion for Summary Judgment, asserting that, as officers, directors, and shareholders, they were immune from liability under CERCLA. The district court granted in part and denied in part the Motion for Summary Judgment, as per the

Court's Minute Entry dated May 22, 1990; the court granted the motion as to Petitioner's claims against Prescott under CERCLA, but denied it as to Petitioner's claims against von Dohlen. The District Court entered a final judgment on July 3, 1990, amending an earlier judgment entered on June 22, 1990. On July 13, 1990, Petitioners appealed the District Court's judgment dismissing the CERCLA action as to Prescott. The Fifth Circuit affirmed the District Court's decision on May 15, 1991.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980

("CERCLA"), 42 U.S.C.A. §§ 9601(20)(A), 9601(21), 9607(a) (1986) are reprinted in the Appendix, p. App. 44-49, infra.

STATEMENT OF THE FACTS

This case arises from the activities engaged in by a corporate entity, IBP, which was formed in 1980 by two individuals, Prescott and von Dohlen. Prescott held eighty-five percent of the stock and acted as Chairman of the Board, secretary, and financial consultant; von Dohlen held fifteen percent of the stock and acted as president and CEO. In 1981, IBP purchased an existing asbestos manufacturing facility ("facility") in uptown New Orleans; IBP continued to use the facility to process asbestos.

Petitioner, Riverside Market Development Corp. ("RMDC"), purchased the facility for the purpose of converting it into its

present state, a shopping center. Pursuant to the Comprehensive Environmental Response Corporation and Liability Act, 42 U.S.C.A. § 9601, et seq., ("CERCLA"), Riverside and its assignees sued IBP and its two stockholders, Prescott and von Dohlen, for the costs of cleaning up hazardous wastes.

The facts as to the IBP's ownership of the facility are as follows. By March 11, 1981, IBP was incorporated pursuant to the state laws of Delaware. As stated above, IBP had only two shareholders; the Respondent, Prescott, held eighty-five percent ownership, and von Dohlen held fifteen percent ownership. On March 11, 1981, IBP purchased the asbestos facility.

Prescott signed a personal note for two million dollars to finance the purchase of the facility. (Record 416) (Excerpt 25). Prescott's involvement in the corporation

also included serving in the capacities of secretary of the corporation, Chairman of the Board, and financial consultant. (Record 597, 401-402) (Excerpt 31, 13-14).

As President, Von Dohlen was the only other officer; he also served as a director. From 1981 until 1984, or for more than 75% of the time IBP operated the facility, Prescott and von Dohlen remained the only shareholders, officers and directors. As of December 2, 1988, Prescott and von Dohlen were still the only officers and directors of record (Record 304) (Excerpt 4).

While IBP owned the facility, from March 1981 until May 1985, every product the facility manufactured contained raw asbestos fibers; the manufacturing process resulted in the creation of asbestos wastes. (Record 594) (Excerpt 29). (See

also Plaintiff's Statement of Undisputed Facts not contested by the defendant). In 1987, RMDC purchased the facility and began the cleanup for which costs are sought in this dispute. (Record 594) (Excerpt 29).

STATEMENT OF THE CASE

The Fifth Circuit's definition of "owner or operator" pursuant to the terms of CERCLA is in direct conflict with the definitions established by the Second and Eighth Circuits. The Respondent claims that he should not be held liable because his position as officer, shareholder, and director made him immune from liability as an owner or operator of the facility in question. Congressional intent and the Second and Eighth Circuits' definition of owner or operator indicates otherwise; under these facts, the Fifth Circuit should have held that Prescott was potentially liable and thus reversed the grant of summary judgment as to Prescott. Respondent qualifies as an owner or operator of the facility, and, as such, should be held liable for cleanup costs.

The question then to be addressed is did Congress intend for the majority stockholder, chairman of the board, officer, consultant, and active manager of a corporation to escape liability for that corporation's improper disposal of hazardous waste? In 1980, Congress enacted CERCLA as a solution to the environmental problems facing the nation as a result of the improper disposal of, and consequent contamination from, hazardous waste. Congress intended to liberally impose liability upon those parties who benefitted from the activities of a facility which disposed of hazardous waste. Therefore, Congress imposed cleanup costs on any person owning or operating a facility which disposed of hazardous waste. 42 U.S.C.A. § 9607(a)(ii) (West Supp. 1990). Congress defined owner or operator in such a manner

as to encompass corporations and individuals who owned or operated a facility which disposed of hazardous waste. CERCLA, 42 U.S.C.A. § 9601(20)(A), 9601(21). Courts would determine whether a party was an owner or operator and therefore liable for the cleanup costs.

ARGUMENT

THE COURT OF APPEALS OF THE FIFTH CIRCUIT ERRED IN UPHOLDING THE GRANT OF SUMMARY JUDGMENT WHEN, IN CONFLICT WITH THE SECOND AND EIGHTH CIRCUIT PRECEDENTS, IT REASONED THAT THE MAJORITY STOCKHOLDER AND ACTIVE MANAGER OF A CORPORATION CANNOT BE HELD LIABLE AS AN "OWNER OR OPERATOR" FOR THE BUSINESS' IMPROPER DISPOSAL OF HAZARDOUS WASTE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 ("CERCLA"), 42 U.S.C.A. § 9601, et seq.

IN ENACTING CERCLA, CONGRESS DID NOT INTEND THAT SHAREHOLDERS, OFFICERS, AND DIRECTORS OF A CORPORATION WHO ACTIVELY PARTICIPATED IN THE MANAGEMENT AND EFFECTIVE CONTROLLED THE OPERATIONS OF THE CORPORATION, SHOULD ESCAPE LIABILITY ON THE GROUNDS THAT ONLY

THE CORPORATION, AND NOT THE INDIVIDUALS ACTING ON BEHALF OF THE CORPORATION, COULD BE HELD LIABLE AS OWNERS AND OPERATORS.

In this action, the Fifth Circuit conferred immunity on an individual who occupied the positions of majority shareholder, secretary, Chairman of the Board, and financial consultant of a corporation that had only one other officer/shareholder. The rationale of both the Fifth Circuit and the district court was that such an individual was immune from liability under CERCLA because he was not in direct operational control of the corporation's disposal of asbestos, its only product.

The Fifth Circuit's decision in this case conflicts with the holdings of the Second and Eighth Circuits and numerous district courts which have addressed this

issue and with the holdings of other courts which have addressed analogous issues. The Second and Eighth Circuits have recognized that shareholders, officers, and directors of a corporation may be held liable under CERCLA if they actively participated in the management and operation of the corporation; in contrast, the Fifth Circuit held that those individuals are shielded from liability by principles of limited liability.

This action presents the precise situation for review by writ of certiorari contemplated by U.S. Supreme Court Rule 10.1(A); it presents an important question of statutory interpretation concerning who will bear the cost of cleaning up the nation's hazardous waste. Specifically, that question concerns who qualifies as an owner or operator of a facility as those

terms are used under 42 U.S.C.A. § 9607(a) and as those terms are defined under 42 U.S.C.A. § 9601(20)(A). The cleanup of hazardous waste is an expanding government program, making resolution of the issue increasingly crucial.

Although this case deals with the cleanup costs of a former asbestos manufacturing plant, the decision in this matter as to the scope of liability as it regards owners and operators will have significant ramifications for a plethora of lawsuits concerning the potential liability of hundreds of parties for the cleanup of waste disposal sites.

The Fifth Circuit's decisions have also differed from other courts in another issue of the scope of liability under CERCLA. Specifically, the Fifth Circuit has held that a parent corporation cannot be held

liable for the actions of its subsidiary in failing to comply with the requirements of CERCLA; the First Circuit and numerous district courts have held that a parent corporation can be held liable for its actions in operating its subsidiary if the subsidiary fails to comply with CERCLA's mandates.

Congress enacted CERCLA in order to redress problems associated with the disposal of and contamination from hazardous waste. The statute was remedial; thus, liability under it should be interpreted liberally. The Fifth Circuit has unnecessarily construed the statute narrowly, thus failing to impose liability for cleanup on the parties in the best position to remedy the situation.

Unless this Court overturns the Fifth Circuit's narrow approach to liability, the

Fifth Circuit will persist in its refusal to impose liability upon parties who should be held responsible for cleanup costs and, in many instances, there will be no one to pay for the cleanup of hazardous substances. Certiorari is sought in this matter to prevent such a restricted reading of the persons liable for cleanup costs under CERCLA.

a. The legislative history of CERCLA clearly manifests Congressional intent to impose liability upon any persons who are in a position to execute the cleanup plan for the facility in question.

CERCLA was enacted in response to the increasing public concern about the environment in general and the problems of the disposal of and contamination from hazardous waste in particular. CERCLA is

a remedial statute intended to improve the environment in order to perpetuate the health and well-being of the people. It was designed to bring order to partly redundant and partly inadequate federal hazardous substances cleanup and compensation laws. F. Anderson, D. Mandelker & A. Tarlock, Environmental Protection: Law and Policy (1984). Congress intended that those who plant their pollutant seeds should pay for the fruits they bear. S. Rep. No. 848, 96th Cong., 2d Sess. at 13. Failure to apply CERCLA to owners and operators would thwart the congressional purpose of holding liable for cleanup costs those who reap the benefits of improper hazardous disposal.

b. Courts other than the Fifth Circuit have uniformly and consistently fulfilled the

Congressional intent to impose liability under CERCLA upon shareholders, directors, and officers of corporations who actively participate in and manage the affairs of the corporation.

United States v. Northeastern Pharmaceutical ("NEPACCO"), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848, 108 S.Ct. 146 (1987) and State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) are in conflict with the Fifth Circuit's decision in this case.

In NEPACCO, supra, the court said:

> [C]onstruction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and

> disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.

Id. at 743. The court imposed liability upon John W. Lee, the vice-president and shareholder of the corporation and supervisor of its manufacturing plant. Id. at 742. Lee was found liable because, as a plant supervisor, he actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of hazardous waste. The court said that an individual who actually participates in conduct that violates CERCLA can be held personally liable. Id. at 744.

In Shore Realty, supra, the court held that Donald LeoGrande, an officer and stockholder of Shore Realty Corp.

("Shore"), was jointly and severally liable with Shore under CERCLA. The court read the statute and, particularly, the definition of owner and operator, which excludes "a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the facility," to imply that an owning stockholder who manages the corporation is liable under CERCLA if the corporation is liable. Id. at 1052. Since LeoGrande incorporated Shore solely to purchase the property at issue and since he made, directed, and controlled all corporate decisions, the court held that he was liable as an operator under CERCLA. Id. at 1052.

Indeed, the vast majority of those courts, excepting the Fifth Circuit, have

held that those persons who actively participate in management are potentially liable for cleanup costs incurred as a result of improper disposal by the corporation. The other courts have held that persons associated with the corporation are potentially liable as individuals; furthermore, courts other than the Fifth Circuit have in fact held such persons liable in numerous cases.

In a district court decision, United States v. Fleet Factors Corp., 724 F.Supp. 955 (S.D.Ga. 1988), aff'd 901 F.2d 1550 (11th Cir. 1990), reh'g denied 911 F.2d 742 (11th Cir. 1990), cert. denied 111 S.Ct. 752 (1991), Horowitz and Newton, the sole shareholders of a printing facility, were held liable under CERCLA. Id. at 962. The court based its decision that Horowitz and Newton qualified as owners and operators

on the undisputed fact that Horowitz and Newton actively managed the facility. Id. at 961.

Kelley v. Thomas Solvent Co., 727 F.Supp. 1554 (W.D.Mich. 1989), held that corporate individuals were potentially liable for CERCLA violations. It reasoned:

> CERCLA's statutory scheme varies the configuration of traditional corporate principles which prevent individual liability absent a conclusion that an individual engaged in procedural irregularities justifying a court in "piercing of the corporate veil" or that an individual has had close, active involvement or direct supervision in the events leading to the alleged tortious harm.

Id. at 1560. The court went on to cite

NEPACCO, supra, Shore Realty, supra, and several district court cases in concluding that the weight of authority holds that, in some circumstances, under CERCLA or related statutory schemes, a court may find an individual personally liable for unlawful hazardous waste practices where strict traditional corporate principles do not apply. Id. at 1561. The court said the relevant inquiry for deciding whether to hold an individual liable is whether he could have prevented the hazardous waste discharge at issue.

The court refused to dismiss the plaintiff's claim in Kelley ex rel. Michigan NRC v. Arco Industries, 721 F.Supp. 873 (W.D.Mich. 1989), because the court found the defendants were potentially liable for CERCLA violations as shareholders or officers and directors of

Arco. The court cited numerous cases in stating:

> [T]he case law suggests that corporate officers can be held liable under CERCLA for unlawful disposal of hazardous waste.... The decisions that concern "owners or operators" under § 107(a)(1) base liability decisions on the individual officer's knowledge, responsibility, opportunity, control, and involvement in the disposal process.

Id. at 878. Defendants Matthaei and Ferguson were potentially liable under CERCLA because Matthaei had "overall responsibility for operation and management" of the site and Ferguson "directly oversees the operation and management of the plant." Id. at 879, citing Complaint paras. 11, 12.

Numerous other district court cases have similarly held corporate individuals liable under CERCLA. United States v. Carolawn Co., 14 Env't L.Rep. 20,699 (D.S.C. 1984) (held that three corporate officers were personally liable under CERCLA); United States v. Conservation Chemical Co., 628 F.Supp. 391 (W.D.Mo. 1985) (corporation's founder, chief executive officer and majority stockholder liable under CERCLA).

c. The Fifth Circuit's declaration that a shareholder, officer, and director cannot be held liable under CERCLA is in direct conflict with Fifth Circuit holdings that corporate individuals are potentially liable as individuals and with the Fifth Circuit's definitions of owner or operator in analogous contexts.

The Fifth Circuit has repeatedly

maintained that an officer of a corporation can be held personally liable for a tort when he participates in or authorizes the commission of the tort, even on behalf of the corporation. Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985); Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980) (officers who take part in the commission of a tort by the corporation may be held personally liable).

Since a corporate officer is potentially liable, he should be held liable under CERCLA if he fits the meaning of "owner or operator" as used in 42 U.S.C.A. § 9607(a) and as defined in 42 U.S.C.A. § 9601(20)(A). Section 9607(a) defines persons who are liable under private causes of action to include "... the owner and operator of ... a facility." § 9601(20)(A) defines owners and operators as follows:

> The term "owner or operator" means ... (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility.... Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Providing further guidance is the Fifth Circuit's definition of owner or operator under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., (West 1986 & Supp. 1990), which closely parallels CERCLA. The Fifth Circuit defined an owner or operator as an individual who has the "power to direct the activities of persons who control the mechanisms causing the

pollution. The owner-operator has the capacity to prevent and abate damage." United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972).

d. The Fifth Circuit's declaration that a shareholder, officer, and director cannot be held liable under CERCLA is in direct conflict with the intentions of Congress in enacting CERCLA and with decisions of the Second and Eighth Circuits and several district courts which have addressed the issue.

The Fifth Circuit's position on this matter is contrary to legislative and judicial precedent. Congress has clearly stated that those persons who incur the benefits of improper hazardous waste disposal should be held liable for their actions. The Second and Eighth Circuits have construed liability broadly in order

to effectuate Congress' purpose. In contrast, the Fifth Circuit has construed liability narrowly, allowing parties who benefit from improper disposal to escape liability.

For instance, in Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S.Ct. 1017 (1991), the Fifth Circuit declined to hold that a parent corporation was potentially liable for its subsidiary's failure to comply with the requirements of CERCLA:

> Joslyn urges this court to read CERCLA's definition of "owner or operator" liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute. ... We decline to do so.

Id. at 82. This decision is obviously contrary to Congress' intent that CERCLA,

a remedial statute, be interpreted broadly. It is likewise inimical to cases decided by other circuit and district courts in which those courts properly construed liability under CERCLA broadly. See NEPACCO, supra; Shore Realty, supra; Mobay Corp. v. Allied-Signal, Inc., 761 F.Supp. 345, 350 (D.N.J. 1991).

Similarly, the Fifth Circuit has declined to impose liability upon corporate officers under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq.. Even though that statute imposes liability upon "Every person and every corporation that shall violate any of the provisions of [the River and Harbors Act]," the Fifth Circuit denied that corporate officers were potentially liable. United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976). The court said that since the Act

did not explicitly deem corporate officers liable, they were protected by principles of corporate liability.

In United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976), which was also decided under the River and Harbors Act, the Fifth Circuit again declined to impose personal liability, even though the personal involvement of the corporate officer had been clearly established. The court reasoned:

> We have today explained in Sexton, supra, that the Rivers and Harbors Act does not authorize such personal liability.

Id. at 1310. In both Sexton, supra, and Moretti, it is important to note that the Fifth Circuit did not just refuse to impose personal liability on the facts of the case, but declared that an individual could

not be held liable for the corporation's violations of the Act, regardless of the facts.

In summary, the decisions of the Fifth Circuit regarding liability of corporate officers are clearly contrary to decisions of the Second and Eighth Circuits and to the intent of Congress. In addition, the decisions run counter to the Fifth Circuit's own precedents, set forth in cases such as Mozingo, supra, and Shingleton, supra, which hold that a corporate officer may be held personally liable for the acts of the corporation. Thus, this Court should review this case in order to clarify the issue of whether a corporate individual is potentially liable for violations of CERCLA.

If this Court finds that an individual may be held liable for corporate

violations, then Prescott should be found liable as an owner or operator because he satisfies the definitions of owner or operator set forth above. He does not qualify for the exemption stated in 42 U.S.C.A. § 9601(20)(A) because he did in fact participate in the management of the facility and because the position that he occupied within the corporate structure was one from which he completely controlled the corporation. The facts clearly demonstrate his ongoing participation in monthly management meetings discussing the financial status of the New Orleans asbestos operation. He received memoranda during the operational phase of IBP which concerned the actual operations of the plant. (Record 425) (Excerpt 28). Finally, not only is he the sole other officer but von Dohlen also describes him as a

consultant for the corporation. (Record 401) (Excerpt 13).

CONCLUSION

Left standing, the Fifth Circuit's decision amounts to a carte blanche for individuals to shield themselves with straw corporations in order to effect the dastardly deed of toxic disposal. They may own and control the company so long as they are not the persons charged with pushing the right buttons.

Because the Fifth Circuit's decision conflicts with holdings of the Second and Eighth Circuits, it will cause great uncertainty regarding the potential liability of shareholders, officers, and directors of a corporation for the corporation's failure to comply with the requirements of CERCLA. The Fifth Circuit's decision will allow persons to

incur the benefits of improper disposal of hazardous wastes without paying the costs associated with their actions.

Petitioner respectfully requests that this Court grant certiorari on the issue of whether it is proper to exempt shareholders, officers, and directors of a corporation from liability under CERCLA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of August, 1988 to Ralph S. Hubbard III, Friend, Wilson, & Draper, LL&E Tower, Suite 2600, 909 Poydras Street, New Orleans, LA 70112-1017, and to each other party to this action by depositing same in the United States mails, properly addressed to his, her or its counsel of record, first class postage prepaid.

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By: _____
SCOTT R. BICKFORD
JOHN R. MARTZELL

STATE OF LOUISIANA)
)SS
PARISH OF ORLEANS)

SWORN TO AND SUBSCRIBED before me the undersigned authority this 13th day of August, 1991.

_____
Regina O. Matthews
NOTARY PUBLIC
State of Louisiana

APPENDIX

App.

[FILED MAY 15, 1991]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3531

RIVERSIDE MARKET DEVELOPMENT CORP.,
ET AL
PLAINTIFFS-APPELLANTS

V.

INTERNATIONAL BUILDING PRODUCTS, INC.,
ET AL

Appeal from the
United States District Court
for the Eastern District of Louisiana
Honorable Veronica Wicker,
District Judge, Presiding
Argued and submitted _____

MEMORANDUM

Before: THORNBERRY, HIGGINBOTHAM
and BARKSDALE
CIRCUIT JUDGES

PER CURIAM:

The appellants, a group of developers, purchased an asbestos product manufacturing facility in New Orleans, Louisiana and

converted the facility site into a shopping center. Invoking the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1990), the appellants sought to recover cleanup costs from an officer and former majority shareholder of the asbestos product manufacturing facility. The district court granted the corporate officer's motion for summary judgment finding that no genuine issue of material fact existed to show that the officer was an "owner or operator" of the asbestos manufacturing facility within the meaning of CERCLA. After conducting a de novo review of the record, we agree with the district court's finding, and, therefore, we AFFIRM

I.

FACTS AND PROCEEDINGS BELOW

This case arises from the purchase, demolition and cleanup of an asbestos manufacturing plant that had been operating on Tchoupitoulas Street at the foot of Jefferson Avenue in the middle of uptown New Orleans, Louisiana for some fifty-seven years. The plant had operated under the control of R. J. Dorn Corporation and Asbestone Corporation for twenty-five years, followed by twenty-eight years of operation under the ownership of National Gypsum Company. In 1981, National Gypsum sold the entire operation to International Building Products ("IBP"), a Delaware corporation and a defendant in the district court. After the sale, IBP continued to employ the entire National Gypsum work

force, approximately 230 people, and the facility continued to manufacture asbestos products.

At the time of the purchase of the asbestos plant, IBP had two shareholders, T. Gene Prescott, holding eighty-five percent. See Record of Appeal, Vol. 2 at 402 and 405. Prescott held the positions of secretary of the corporation, consultant and chairman of the board, see Record on Appeal, Vol. 1 at 93; Vol. 2 at 304 and 401, while von Dohlen served as the company's president and chief executive officer, see Record on Appeal, Vol. 2 at 304 and 395. Prescott lived in New York and visited the New Orleans facility only two to four times a year. See id. at 403. The purposes of these visits included: attending the annual Christmas party,

attending a meeting for an Erectors' Association,s one of whose members were IBP customer, and brief visits with executive personnel. See Record of Appeal, Vol. 1 at 93. As an IBP officer, Prescott reviewed financial statements regularly and von Dohlen testified that "[d]uring meetings of officers, [Prescott] consulted with me or other people but that's about it." See id. Von Dohlen took a more active part in the in the day-to-day operations of the plant, spending approximately forty percent of his work week at the New Orleans factory and negotiating contracts with various fiber suppliers to supply raw asbestos to the plant. See id at 395-96 and 407.

IBP continued to operate the asbestos plant until 1985 when a continuing decline

in the market for asbestos products forced IBP to shutdown the operation. Soon after the closing of the facility, IBP was contacted by Gordon Kolb, president of Riverside Market Development Corporation ("RMDC"), who negotiated to purchase the site in order to develop a shopping center. IBP lowered its original asking price of $3,400,000 by $410,000 in return for Kolb's promise to undertake demolition of the facility on his own and relieving IBP of that obligation. Both Louisiana and federal law require that, prior to demolition of any building, all friable asbestos must first be removed. RMDC purchased the plant site at the reduced price in November 1985 and later transferred title to the property to Riverside Market Limited Partnership

("RMLP"). Cleanup of the site was completed in 1986. In December 1988, RMDC sued IBP as well as its two corporate officers, von Dohlen and Prescott, to recover for cleanup costs. RMDC alleged that IBP had improperly disposed of hazardous wastes including asbestos and by-products of the asbestos manufacturing process. RMLP was later added as a plaintiff by RMDC's second amended complaint. See Record on Appeal, Vol. 1 at 186. Still a third amended complaint substituted twelve individuals, all former partners in RMLP, as plaintiffs to replace RMDC and RMLP. See Record on Appeal, Vol. 1 at 104. The plaintiffs based their claims against the individual officers of IBP on § 9607(a) of CERCLA which states in relevant part that "any person who at the

time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... shall be liable for [cleanup costs]."[1] 42 U.S.C.A § 9607(a) (West Supp.1990).

In March of 1990, the defendants filed a Motion for Summary Judgment arguing among other things that the individual officers of IBP were not "owners or operators" as defined by CERCLA. In response to that motion, District Court Judge Veronica D. Wicker dismissed plaintiffs' complaint in its entirety as to T. Gene Prescott.[2]

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[1] Another section of CERCLA, 42 U.S.C.A. §9613 (f)(1), provides that a party who removes hazardous wastes as required by the Act may seek contribution from "any other person who is liable ... under section 9607(a)."

[2] The court did not dismiss the suit as to von Dohlen, finding that a genuine issue of material fact existed as to whether or not von Dohlen was an "operator"

Plaintiffs filed a timely appeal and now contest the court's dismissal of their CERCLA action only as it applies to T. Gene Prescott. Therefore, the issue presented for our review may be stated as whether or not Prescott, a majority shareholder and office of IBP, may be held personally liable for cleanup costs as an owner or operator of the asbestos manufacturing facility under § 9607(a) of CERCLA.

DISCUSSION

I. Standard of Review

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of the asbestos plant as defined by CERCLA. See Record on Appeal, Vol. 3 at 598. The district court did order a judgment in favor of both von Dohlen and IBP with regard to portions of the plaintiffs' complaint that alleged causes of action for public nuisance and causes of action arising under the Louisiana Environmental Quality Act. See id at 605. These additional findings have not been contested on appeal, and we will therefore ignore them for purposes of this opinion.

In reviewing a district court's grant of summary judgment, we review the evidence de novo and apply the same criteria as that used by the lower court. Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986). For the purposes of this case, the defendant, Prescott, may rest his motion for summary judgment on the absence of evidence to support the plaintiffs' claim that he was an "owner or operator" of the asbestos plant at the time that the CERCLA violations took place. See Celotex Corp. v. Catrett 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed. 2d 265 (1986). The plaintiffs may not defeat

Prescott's motion for summary judgment with "evidence [which] is merely colorable or is not significantly probative." Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted). The plaintiffs must instead come forward with "significant probative evidence demonstrating the existence of a triable issue of fact." Southmark Properties v. Charles House Corp., 742 F.2d 862, 877 (5th Cir. 1984).

II. Owner or Operator under CERCLA.

[1] Under 42 U.S.C.A. §9601 (20)(A), CERCLA defines "owner or operator" as "any person owning or operating' a facility, and it specifically excludes any "person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."

Prescott's position as majority shareholder of IBP did not make him an owner of the asbestos manufacturing plant. The plant was purchased by the IBP corporate entity and not by Prescott. "The property of the corporation is its property, and not that of the stockholders, as owners." 1 C. Keating & G. O'Gradney, Fletcher Cyclopedia of the Law of Private Corporations § 31 at 555 (1990).

[2] We now turn to the question whether Prescott could have been considered an "operator" of the asbestos plant during the time that the plant was owned by IBP. Because CERCLA was a hastily drafted Act and passed through a lame-duck Congressional session,[3] it is not

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[3] See Developments in the Law - Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1465 & n.1 (1986); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H.

surprising that the statute does not explicitly describe the defining character of an "operator" as used within the statute. While we can conceive of situations where an individual director, officer or employee of a corporation may be considered an "operator" of a manufacturing facility as defined by CERCLA, this suit, does not present such a situation.

Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees like Prescott from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding

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1985) ("CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history.").

behind the corporate shield, when as "operators," they themselves actually participate in the wrongful conduct prohibited by the Act. See 42 U.S.C.A. § 9607(a) (West Supp. 1990) ("any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... shall be liable [cleanup costs]."); see also S. Rep. No. 848, 96th Cong., 2d Sess. 98 (1980) (noting that society should not bear the costs of protecting the public from hazardous wastes generated by an "owner or operator who ... now wishes to be insulated from any continuing responsibilities."). In such cases, a defendant can be held individually liable for his wrongful conduct. "[T]his personal liability is distinct from the

derivative liability that results from 'piercing the corporate veil'" where we would hold the owners of a less than bona fide corporation responsible for corporate acts. United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 744 (8th Cir. 1986), cert denied, 484 U.S. 848 108 S. Ct. 146, 98 L.Ed 2d 102 (1987); cf. 3A S. Flanagan & C. Keating, Fletcher Cyclopedia of the Law of Private Corporations §1135 (1986) ("Corporate officers are liable for their torts, although committed when acting officially."). In determining liability in cases like the one now before us, we must look to the extent of the defendant's personal participation in the alleged wrongful conduct.

The plaintiffs in this case have failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. The record clearly indicates that Prescott spent very little time at the asbestos plant, and no evidence has been presented to indicate that such visits would have provided Prescott with the opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products. Prescott lived in New York and only visited New Orleans two to four times a year; and his participation in plant operations were limited to reviewing financial statements and attending meetings of the officers where he consulted with von Dohlen and others. On such sparse evidence we find that the district court

committed no error in granting summary judgment in favor of Prescott.

AFFIRMED.

[FILED 5/23/90]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVEL. CORP.	CIVIL ACTION #88-5317
VERSUS	
INTERNATIONAL BUILDING PRODUCTS ET AL	SECTION "L" (6)

This case arises from the demolition and clean-up of an asbestos manufacturing facility located in new Orleans, Louisiana.

On March 11, 1981, the defendant International Building Products, Inc. ["IBP"], a Delaware corporation, purchased the National Gypsum Company plant site, facility, equipment and materials and hired National Gypsum's entire work force to continue operating the plant. IBP continued to manufacture asbestos cement

products for four years. After the plant closed in March, 1985, a few IBP employees were retained to clean up the site to make it presentable for sale. In May, 1985, purchasers were found who wanted to build a shopping center on the site, so the asbestos manufacturing plant had to be demolished. IBP agreed at first to sell the property for $3,400,000 and to be responsible for tearing the building down to the slab. Later IBP reduced the selling price by $410,000 because the buyers agreed to demolish the building themselves. Louisiana and federal law required that, prior to demolition of any building, all friable asbestos first be removed.

Riverside Market Development Corporation ["RMDC"] purchased the plant site on November 7, 1985. On March 20, 1986, RMDC

transferred title to the site to Riverside Market Limited partnership ["RMLP"] and transferred to RMLP its claim for cleanup costs. Clean up was completed in August, 1986. On December 2, 1988, the plaintiffs sued IBP and its two corporate officers, Gerard von Dohlen and T. Gene Prescott, to recover clean up costs. By amended complaint, RMLP and twelve individuals have been added as plaintiffs.

The defendants filed a motion for summary judgment asking the Court to dismiss plaintiffs' complaint in its entirety against von Dohlen and Prescott; to dismiss the plaintiffs' state law claims in Count IV (arising under the Louisiana Environmental Quality Act ["LEQA"] and in Count II (a claim for unjust enrichment and public nuisance) against IBP; and to

dismiss all claims of RMDC and RMLP with prejudice.

Defendants' motions were submitted to the Court on a former date. Having considered the briefs and arguments of counsel and the applicable law, the Court ORDERS that the defendants' motion for summary judgment BE GRANTED IN PART AND DENIED IN PART:

Defendants' motion for summary judgment IS GRANTED as to all of the plaintiffs' claims against Prescott, and as to plaintiffs' state law claims against von Dohlen and IBP contained in Count IV (arising under the LEQA) and in Count II (public nuisance). Defendants' motion for summary judgment IS DENIED as to plaintiffs' claims against von Dohlen under the Comprehensive Environmental Response

Compensation and Liability Act, 42 USC § 9601 et seq. ["CERCLA"]. The Court will defer ruling on the defendants' motion as to plaintiffs' claim for unjust enrichment in Court II until the time of trial. The Court also reserves its ruling on the defendants' motion as to all claims of RMDC and RMLP until the Magistrate decides the plaintiffs' motion to substitute party plaintiffs.

LIABILITY OF PRESCOTT AND
VON DOHLEN UNDER CERCLA

"Under 42 usc §9607(A), CERCLA provides a private cause of action where a release or threatened release of a hazardous substance causes response costs to be incurred. The persons covered are:

(1) the owner and operator of ... a facility,

(2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person...,

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities..."

Tanglewood East Homeowners et al v. Charles-Thomas, Inc., et al, 849 F. 2d 1568 (5th Cir. 1988)

42 USC §9707(a)(1) covers present owners and operators; 42 USC §9607(a)(2) covers

past owners and operators. Neither von Dohlen nor Prescott ever held title to the asbestos manufacturing facility; neither can be liable as an owner under 42 USC §9607(a)(1) or 42 USC §9607(a)(2). Similarly, since demolition occurred after the sale to the plaintiffs, neither von Dohlen or Prescott qualify as present operators under 42 USC §9607(a)(1). However, CERCLA "does not limit disposal to a one-time occurrence." Tanglewood East Homeowners et al v. Charles-Thomas, Inc., et al, 849 F. 2d 1568 (5th Cir. 1988). "Disposal" may be merely the "placing of any ... hazardous waste into or on any land ..." 42 USC §6903(3). Id. Therefore if hazardous wastes were disposed of during IBP's ownership of the New Orleans facility and if Prescott and von Dohlen "operated'

the facility during that time, they would be liable under 46 USC §9707(a)(2).

42 USC §9601(20)(A) defines "operator" only in the negative: "Such term does not include a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the ... facility." The Court then must look at the activities of Prescott and von Dohlen to determine their degree of participation in the operations of the IBP New Orleans facility.

When IBP purchased the National Gypsum plant, Prescott and von Dohlen were the sole shareholders: Prescott held eighty-five per cent (85%) of the stock and served as Chairman of the Board; von Dohlen held fifteen percent (15%) of the stock and

served as President. From March 1981 through December 1983, von Dohlen also served as Chief Executive Officer. In 1984, other shareholders invested in IBP.

Prescott lived in New York and only visited the New Orleans facility on one to three occasions per year during the time that IBP owned the plant: (1) annual Christmas party; (2) attendance at a meeting for an Erectors' Association, some of whose members used products from the plant and (3) brief visit with executive personnel. (Defendants' Exhibit B.) Von Dohlen testified that Prescott was principally the source of money. (Von Dohlen deposition, August 21, 1987, p. 130). Von Dohlen further explained that as an IBP officer, Prescott reviewed financial regularly. "During meeting of

officers, he consulted with me or other people but that's about it." (Id. at p. 131.) The Court finds no evidence that Prescott was an operator of the asbestos manufacturing facility within the meaning of CERCLA.

As to von Dohlen, however, the Court finds that a genuine issue of material fact exists as to whether or not he was an "operator" under CERCLA. Unlike Prescott, von Dohlen spent forty percent (50%) of his time in New Orleans. He testified that from March 1981 through December, 1984, he spent ten percent (10%) of his time each month at the New Orleans factory. (Von Dohlen Deposition, August 21, 1987, p. 16). Although he states in his affidavit that his major duties involved sales, he testified earlier that he was occasionally

involved in the actual day-to-day operations of the factory, that he may have operated some of the machines himself from time to time in order to solve problems in manufacturing processes, and that he was actually out on the plant floor supervising at other times. (Id. at p. 17.) Ray Plauche confirmed that through 1984, von Dohlen had an office at the plant, and was at the plant "almost every week -- for all practical purposes, three weeks out of the month." (Plauche deposition, September 24, 1987, p. 36.) In a later deposition, von Dohlen testified that from December, 1983, until the plant was sold, he visited it twice: once to meet with the buyer while operations were either still going on or had just ceased [April or May of 1985] and once for the auction/sale. (Von Dohlen

deposition, December 7, 1989, p. 23.)

As to his role in the sale of asbestos products and the disposal of hazardous wastes, von Dohlen testified that he ordered asbestos fiber from various companies and negotiated contracts with various fiber suppliers to supply raw asbestos to the plant. (Id. at p. 26.) He also explained that he participated in altering the formulations of products previously produced by National Gypsum and participated in decisions as to which formulations were to be used in those products. Despite his assertions that he was not involved in decisions about compliance with environmental regulations except for getting the required by the Environmental Protection Agency ["EPA"] permit (Id. at p. 34), von Dohlen admitted

that during his tenure, "We disposed of asbestos pursuant to licenses in the regular course of business in the plant. And we were familiar with those." Von Dohlen was not sure whether there were different regulations for removing asbestos when the plant was demolished. (Von Dohlen deposition, August 21, 1987, p. 43.)

Other evidence shows that when IBP bought the plant from National Gypsum, von Dohlen wrote the cover letter and signed IBP's application for an identification number from the Louisiana Hazardous Waste Management Program for Tchoupitoulas facility. (Plaintiffs' Exhibits 6 and 7.) Also on March 15, 1983, the State of Louisiana sent a warning letter to von Dohlen, as president of IBP, stating that an inspection revealed that a "container

of hazardous waste was not marked with required information" and giving IBP thirty (30) days to correct the violation. (Plaintiffs' Exhibit 11.). Later von Dohlen received a copy of a June 22, 1983, letter to Ray Plauche about OSHA citations. (Plaintiffs' Exhibit 16.) Then in January and March of 1984, the New Orleans Sewerage and Water Board wrote to von Dohlen, as president of IBP, about the lack of compliance with zero discharge of asbestos requirement into the public drainage system. (Plaintiffs' Exhibits 14 and 15.) All of the foregoing evidence raises a significant question about the extent of von Dohlen's participation in the operations of the IBP plant.

Recently, the Fifth Circuit refused to extend CERCLA liability to parent

corporations for the acts of their subsidiaries absent some evidence that the corporate veil had been pierced. Joslyn Manufacturing Company v. T. L. James & Co., Inc. ___F. 2d ___ (5th Cir. Jan. 19, 1990). Movers would have this Court extend Joslyn to cover corporate officers as well. This Court declines to do so for the following reasons. In the first place, even though the district court opinion in Joslyn contained dicta about corporate officer liability,[1] The Fifth Circuit confined itself to the issue of parent/subsidiary liability. Accordingly, Joslyn is clearly distinguishable; there is no

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[1] J. Stagg stated that "[n]either the clear language of CERCLA nor its legislative history provide authority for imposing individual liability on corporate officers." Joslyn Corp. v. R. L. James & Company, Inc., et al, 696 F. Supp. 222, 226 (W.D. La. 1988).

parent/subsidiary question here. In the second place, this Court is not convinced that the dicta in the district court opinion requires a different result in this case. Even though Judge Stagg declined under the facts of Joslyn to follow other Circuits which had held corporate officers liable for hazardous waste clean up under CERCLA, he nonetheless recognized that those cases represented an exception to the general rule of limited liability for corporate officers. Joslyn Corp. v. T. L. James & Company, Inc., et al 696 F. Supp. 222, 224 (W.D. La. 1988).

> These cases [State of N.Y. v. Shore Realty Corp. 759 F.2d 1032 (2d Cir. 1985); United States v. Conservation Chemical Co. 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Carolawn

Company, 21 Env't Rep. Cas (BNA) 2124 (D.S.C. 1984); United States v. Northeastern Pharmaceutical, 810 F. 2d 726 (8th Cir. 1986)] involved factual situations where the personal participation in the illegal disposal of hazardous waste by the corporate officers was significant. As one commentator has noted, these "courts have avoided the common law rule of limited liability by either explicitly or implicitly applying a generally recognized exception: a corporate officer is liable for the wrongful acts of a corporation when he personally participates in the wrongful conduct." Comment, 38 Mercer L. Rev. at 685. If T. L. James & Company and its officers and

directors had been actively involved in the day-to-day operations of Lincoln, including the disposal of hazardous waste, then, arguably, liability would attach. See generally Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980) L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc. 619 F.2d 455 (5th Cir. 1980); 'Tillman v. Wheaton-Haven Recreation Associations, Inc., 517 F.2d 1975.[2]

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[2] In Shingleton, corporate officers approved the use of fraudulent misrepresentations to induce the sale of an electrostatic decorating service. In L.C.L. Theatres, Inc., the president and principal shareholder approved and participated in fraudulently underreported box office receipt in order to avoid rent obligations. The Court said "in these circumstances, '[i]t is not necessary that the corporate veil be pierced or even discussed. An officer of any other agent of a corporation may be personally as responsible as the corporation itself for

Id., n. 20,

If, as in the cases cited by Judge Stagg, von Dohlen personally participated in the disposal of hazardous wastes, then he may be liable for the wrongful acts of the corporation even under Judge Stagg's Joslyn opinion. There are still significant unresolved questions of fact over von Dohlen's personal participation in IBP's activities. Those disputes of fact prevent the Court's granting summary judgment in von Dohlen's favor on the CERCLA issue.

LIABILITY OF ALL DEFENDANTS

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tortious acts when participating in the wrongdoing [Citations omitted.]* 619 F. 2d at 457. In Tillman,, the directors of community swimming pool association were found to be personally liable for unlawfully discriminating against black applicants because the directors had knowingly voted for discriminatory policies.

UNDER LEQA

Even though the Court finds material disputes of fact which preclude the granting of the motion for summary judgment in von Dohlen's favor based on CERCLA, the Court agrees with the defendants that there can be no liability on the part of Prescott, von Dohlen or IBP under LEQA.

Those responsible under LEQA are similar to those responsible under CERCLA[3] so

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[3] La. R.S. 30:2273 "persons who must comply with requirements of this Chapter," provides:

> (1) The owners, operator, or lessee of any pollution source or facility.
>
> (2) Any person who generated a hazardous waste which was eventually transported, stored, disposed of or discharged at a pollution source or facility.
>
> (4) Any other person who disposed of or discharged a hazardous substance at a pollution source or facility.

Prescott bears no liability as an "operator" under either statute. Plaintiffs also have no claim under LEQA against IBP as owner and against von Dohlen, even if he were found to be an "operator" under CERCLA and LEQA, for the following reasons.

LEQA is designed primarily as a remedy for the state of Louisiana.[4] It allows the

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[4] Chapter 12, "Liability for Hazardous Substance Remedial Action, La. R.S. 30:2271 Findings and Purpose" provides:

A(4) The state cannot and should not bear the costs associated with a private profit making venture.

(B) The purpose of this Chapter is to encourage prompt notification to the department of any hazardous substance ... disposal, to identify locations at which a ... disposal of a hazardous substance may have occurred at any time in the past, to provide a mechanism to the department to insure that the costs of remedial actions are borne by those who contributed to the ... disposal, and to allow the department to respond as quickly as possible to

State to "make a written demand on every owner,... operator, or other responsible person who has participated in the disposal or discharge of a hazardous substance at the site to undertake remedial actions at the site in accordance with a plan approved by the secretary or pay to the secretary the cost of the remedial action to be taken by the secretary." La. R.S. 30:2275. La. R.S. 30:2276 allows the state to recover the costs of remedial action.[5] La. R.S.

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hazardous substance discharges while retaining the right to institute legal actions against those responsible for remedial costs.

[5] La. R.S. 30:2276(A) provides
The court shall find the defendant liable to the state for the costs of remedial action taken because of any actual or potential discharge or disposal which may present an imminent and substantial endangerment to health or the environment at a pollution source os facility if the court finds that the defendant performed any of the following: ...

30:2276(F) recognizes that there may be several sources of hazardous wastes and creates a presumption of in solido liability among those sources for the costs of recovery, which presumption may be

rebutted in a court proceeding.[6] La. R. S. 30:2276(G) is the penalty provision designed for those who fail to respond to the state's demands. La. R.S. 30:2276(G) provides:

> Those participating parties who agree to clean up the pollution source or facility prior to the initiation of suit [by the State] may sue and recover from any other

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[6] La. R.S. 30:2276(F) provides: All persons who have generated a hazardous substance disposed of at the site,... or disposed of a hazardous substance at the pollution source or facility shall be presumed to be liable in solido by the court for the cleanup of the site unless a party shows by a preponderance of the evidence that the costs of remediation should be apportioned and there is a reasonable basis of determining the amount of the contribution of each party to the discharge of disposal. [H]owever, any party shall have the right to establish his proportionate contribution to the site and his liability shall be limited to his degree of contribution.

nonparticipating party who shall be liable for twice their portion of the remedial costs.

A "participating party" is a "person who undertakes remedial action after receiving a demand from the secretary in compliance with the demand and as approved by the secretary." La. R.S. 30:2272(7). In this case, the buyers of the property qualify as participating parties under the statute. They received written demand from the State to clean up the facility, which they subsequently did to the state's satisfaction. (Plaintiffs' Exhibits 19, 20, 21.) Prescott, von Dohlen and IBP, however, do not qualify as either participating or nonparticipating parties under the statute. A "nonparticipating party" is "a person who refuses to comply

with the demand of the secretary, or fails to respond to the demand, or against whom a suit has been filed by the secretary." La. R.S. 30:2272(6). There is no evidence that IBP or Prescott or von Dohlen -- the sellers -- ever received any written demand from Louisiana. To the contrary, the affidavits attached to movers' motion attest that, in fact, no written demand was received by IBP from Louisiana Department of Environmental Quality. (Defendants' Exhibits A and B.) Accordingly, the plaintiffs may not sue the defendants under LEQA and Cont IV is dismissed in its entirety.

As to the remaining claims, there was no opposition to the dismissal of the state public nuisance claim; the Court will decide at a later date the other two issues

(unjust enrichment in Count II and dismissal of RMDC and RMLP).

New Orleans, Louisiana, this 22nd day of May, 1990.

VERONICA D. WICKER

§9601 (20)(A) The term "owner or operator means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

§9601 (21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State municipality, commission, political subdivision of a State, or any interstate body.

§9607(a) Covered persons; scope, recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

(3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release,

or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under

section 9604(i) of this title.

This amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of Chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the

date on which interest accruing shall be determined with reference to the date on which interest accruing under the subsection commences.

(2)

NO. 91-458

In the Supreme Court of the United States

OCTOBER TERM, 1991

RIVERSIDE MARKET LIMITED PARTNERSHIP, ET AL.
(Philip C. Witter; Gordon H. Kolb, Hirschel T. Abbott, Jr.; Philip Gensler, Jr.; George G. Villere; G. Walter Loewembaum; Lillian Shaw Loewembaum; Leon T. Reymond, Jr.; George V. Young; Michael R. Schneider)
Petitioner

VS.

T. GENE PRESCOTT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HELD THAT SHAREHOLDERS, OFFICERS AND DIRECTORS OF A CORPORATION ARE TOTALLY EXEMPT FROM LIABILITY UNDER CERCLA, THEREBY CONTRADICTING HOLDINGS OF THE EIGHTH AND SECOND CIRCUIT COURTS OF APPEALS.

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STATEMENT OF THE CASE

The Petitioners herein seek to hold a shareholder liable for the costs of cleanup of hazardous waste under CERCLA despite the undisputed fact that the shareholder was not in any way involved in either the day-to-day operations of the facility or the disposal of such waste. Such a holding would be contrary to every judicial decision published on the subject as well as a clear reading of the pertinent statute. This Court should, therefore, not choose to review the Fifth Circuit's refusal to defy precedent and statutory authority by granting Petitioner's request.

The following facts are undisputed:

For some 57 years an asbestos manufacturing plant was operated in the City of New Orleans on Tchoupitoulas Street at the foot of Jefferson Avenue (the "Plant"). It was the demolition of the manufacturing facility located on the Plant site which gave rise to the captioned suit. The Plant had been operated for 25 years by R. J. Dorn Corporation and Asbestone Corporation, followed by 28 years operation by National Gypsum Company. Von Dohlen Affidavit, Record at p. 85, para. 4. [The affidavits of Gerard N. von Dohlen and T. Gene Prescott are attached to this opposition as Respondent's Appendices ("Resp. App.") A and B, respectively. They are found in the record Vol. I, at pp. 84-95.] On March 11, 1981, the Plant site, the Plant facility, and all of the equipment and materials therein were purchased by a duly organized Delaware corporation, a defendant in the district court, International Building Products, Inc. ("IBP"). The Plant was operated by IBP until March of 1985, at which time production ceased because of a declining market for asbestos containing materials in the United States. During the entire period in which the Plant was operated, it was used to manufacture asbestos cement

products such as shingles, siding, and flat sheets. Resp. App. A at paras. 3 and 4; Record at p. 85.

No one associated with IBP had any experience in dealing with asbestos. Thus, the entire National Gypsum work force located at the Plant was hired by IBP to continue the operation of the Plant. The former National Gypsum plant manager, Ray Plauche, who had served in that capacity for a number of years, was among those retained by IBP. Resp. App. A, para. 5; Record at p. 85. Throughout the time that the Plant site was owned by IBP, Mr. Plauche held the title of Vice President of Manufacturing and was the person in charge of running the Plant on a day-to-day basis. Resp. App. A, paras. 8 and 11; Record at pp. 86 and 87.

The Plant was a large operation, employing between 220 and 240 people. Five levels of management separated the Chief Executive Officer of the company (Mr. von Dohlen and then Mr. Timothy Eames) from the employees who actually operated the equipment and handled the raw materials involved in the manufacturing process. Resp. App. A, paras. 6, 7 and 8; Record at pp. 85-86. Prescott never held title to the Plant, the land, the buildings, the equipment or any of the materials utilized there. *See* Affidavit of von Dohlen, Resp. App. A, at para. 16; Record at p. 89; and Affidavit of Prescott, Resp. App. B at para. 10; Record at p. 94. Nor was Prescott even an employee of the Plant, and he undisputably played *no* role whatsoever in its day-to-day operations. He lived outside of the state, visiting only two to four times a year, and remained involved only to the extent of reviewing financials in order to monitor his investment. Resp. App. B at paras. 2, 4, 6, 8 and 9; Record at pp. 92-93.

After the Plant ceased operation in March of 1985,

only a few officers were retained as employees of IBP. They proceeded to engage in a cleanup of the Plant site to make it presentable for sale. Resp. App. A, para. 15; Record at pp. 88-89. IBP was contacted by Gordon Kolb ("Kolb"), who negotiated to purchase the site in order to develop a shopping center, which would of course require the demolition of the Plant facility then located on the Plant site. IBP agreed in May of 1985 to sell the property to Kolb or his designee for $3,400,000, with IBP having the obligation to tear the building down to the slab. At the request of Kolb, that agreement was later modified. The price was reduced by some $410,000 because Kolb decided to undertake demolition of the Plant building, without any obligation to do so on the part of IBP. Kolb thought he could do the cleanup cheaper than IBP. Of course, Louisiana law (and federal law as well) require that, prior to demolition of any building, all friable asbestos first be removed. *See* La.Ad.Code, Vol. 11, Title 33: III. 2601 at p. 249. Kolb's designee, Riverside Market Development Corporation ("RMDC"), purchased the Plant site on November 7, 1985. Opinion of the District Court, Riverside's App. at p. 19; Record Excerpts at p. 29.

Kolb, President of RMDC, discovered to his chagrin that he had underestimated the cost of demolishing the Plant buildings, which led to this suit against IBP as well as von Dohlen and respondent T. Gene Prescott in an attempt to recover alleged asbestos cleanup costs. Von Dohlen and Prescott were shareholders of IBP. Resp. App. A, para. 2; Record at p. 84; Exhibit B, para. 4; Record at p. 93.

On March 20, 1986, RMDC transferred title to the Plant site to Riverside Market Limited Partnership ("RMLP") and transferred to RMLP its alleged claim for cleanup costs as well. Opinion of the District Court, River-

side's App. at pp. 19-20; Record Excerpts at pp. 29-30. The cleanup was completed in August of 1986 according to the Original Complaint. This suit was filed by RMDC on December 2, 1988, notwithstanding the fact that it had transferred its claim to RMLP. The Complaint was subsequently amended to add RMLP as an additional plaintiff, without dismissing the claims of RMDC. Record, Vol 1 at p. 186. More recently, RMLP transferred its claim to twelve individuals, who were substituted as plaintiffs. Record, Vol. 1 at p. 104; Opinion of the District Court, Riverside's App. at p. 20; Record Excerpts at pp. 29-30.

SUMMARY OF ARGUMENT

Petitioners Riverside Market Development Corporation, et al. (collectively "Riverside") claim that the Fifth Circuit has defined "owner or operator" in CERCLA so as to totally exclude personal liability on the part of corporate officers, directors or shareholders for any CERCLA violations by their corporation. On the contrary, the Fifth Circuit specifically held that individuals cannot hide behind a corporate shield "when as 'operators' they themselves actually participate in the wrongful conduct prohibited by [CERCLA]." *Riverside Market Development Corp. v. International Building Products*, 931 F.2d 327, 330 (5th Cir. 1991).

Because it completely misapprehended the holding of the Fifth Circuit, Riverside claims that there is a split in the circuits. In reality, both cases from other circuits cited by Riverside relied on precisely the same principle of law as the Fifth Circuit. *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.* ("NEPACCO"), 810 F.2d 726 (8th Cir.), *cert. denied* 484 U.S. 848 (1987); and *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

The *NEPACCO* court held that a corporate officer was liable only because he was personally involved in the transportation and disposal of hazardous substances and actually participated in the company's CERCLA violations. 810 F.2d at 744. In *Shore Realty*, the Second Circuit noted that the individual defendant specifically directed, sanctioned and participated in the company's maintenance of the nuisance. 759 F.2d at 1052. Additionally, each of the district court opinions relied on by Riverside are premised on the same rule of law as the decisions by the Fifth, Eighth and Second Circuit Courts of Appeals: An individual who actively participates in the tort of a corporation is personally liable along with the corporation. 931 F.2d at 330; 810 F.2d at 744; 759 F.2d at 1052, respectively.

The holding by the Fifth Circuit in this case does not represent a departure from the norm. Rather, the Fifth Circuit relied upon *NEPACCO* (931 F.2d at 330) and its own earlier decisions which stand for the same rule of law. *See Mozingo v. Correct Mfg. Corp.*, 952 F.2d 168 (5th Cir. 1985); *Shingleton v. Armour Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980).

Applying the well-settled law to the facts of the instant case, all four judges who have reviewed the record thus far have unanimously agreed that Respondent/Defendant T. Gene Prescott ("Prescott") cannot be held liable under CERCLA. The Fifth Circuit noted that Riverside had failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. He lived in New York, visited the plant site in New Orleans rarely, and limited his involvement to reviewing financial statements and attending certain meetings of the officers. *Riverside*, 931 F.2d at 330. Prescott played no role whatsoever in the day-to-day operations of the Plant, which was owned and operated by IBP.

IBP employed 220-240 people at the Plant. There were five levels of management, including various officers dealing with environmental matters, who reported to the vice president of manufacturing, who was in charge of all Plant operations. These same facts would have properly led to the same result in the Second and Eighth Circuits as well.

Riverside has misstated the holding of the Fifth Circuit in this case. The law throughout the United States is uniform, and requires a fact-intensive review of the record. Riverside has no justifiable complaint about the law in this case, it simply does not like the result dictated by the facts. Accordingly, its petition is due to be denied.

ARGUMENT

Petitioners Riverside Market Development Corporation, et al. (collectively, "Riverside") style their petition for writ of certiorari as an opportunity for this Court to resolve a conflict between the circuits involving the definition of "owner or operator" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.* Specifically, Riverside complains that the Fifth Circuit has defined "owner or operator" so as to totally exclude personal liability on the part of corporate officers, directors or shareholders for the CERCLA violations of the corporation. Riverside Brief at pp. 11-12.

Riverside's argument, however, is based on a complete misapprehension of the Fifth Circuit's holding. In short, the Fifth Circuit held that:

> Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees ... from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield, when as "operators,"

> they themselves actually participate in the wrongful conduct prohibited by [CERCLA].

Riverside Market Development Corp. v. Int'l Bldg. Prod., 931 F.2d 327, 330 (5th Cir. 1991); Riverside App. at pp. 13-14.

Thus, the Fifth Circuit's decision does not, as Riverside contends, confer blanket immunity on corporate officers contrary to the intent of Congress in enacting CERCLA. Moreover, in its holding, the Fifth Circuit reaffirmed its own precedent on this issue, and followed the decisions of other circuits.

Riverside's claim that there is a conflict between the courts of appeals is betrayed by the very cases upon which Riverside stakes its claim, *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.* (*"NEPACCO"*), 810 F.2d 726 (8th Cir.), *cert. denied* 484 U.S. 848 (1987); and *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985).

In *NEPACCO,* the Eighth Circuit held a corporate officer liable under CERCLA. In so doing, however, the court noted that "[l]iability *was not* premised solely upon [the defendant's] status as a corporate officer or employee." 810 F.2d at 744 (emphasis added). Instead, the court imposed individual liability because the defendant "personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations." *Id.* In sum, the liability imposed on the corporate officer in *NEPACCO* "was not derivative but personal." *Id.* The rule in the Eighth Circuit is precisely that of the Fifth Circuit, according to the *NEPACCO* court.

> A corporate officer is individually liable for the torts he [or she] personally commits [on behalf of the corporation] and cannot shield himself [or herself] behind a corporation when he [or she] is

> an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his [or her] responsibility.

Id., quoting Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978). Indeed, the court below *in this action* relied on *NEPACCO* in articulating the relevant standard. 931 F.2d at 330; Riverside App. at p. 15.

Similarly, in *Shore Realty*, the Second Circuit held an officer and stockholder liable under CERCLA. As in *NEPACCO*, the court did not impose liability solely on the basis of the defendant's status as an officer of the corporation. Instead, the court found that the defendant was "in charge of the operation of the facility in question ..." and "specifically directs, sanctions, and actively participates in Shore's maintenance of the nuisance," and thus held him personally liable under CERCLA. 759 F.2d at 1052. Like the Fifth and Eighth Circuits, the Second Circuit noted that:

> New York courts have held that a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation.

Id.

Riverside also points to several district court decisions supposedly in conflict with the Fifth Circuit's holding in this case. In each of those decisions, the court found individual, not derivative, liability on the part of corporate officers, directors or shareholders arising out of the respective defendant's active participation in or management

authority over the conduct violating CERCLA. *Kelly ex rel. Michigan NRC v. Arco Indus.*, 721 F.Supp. 873, 878 (W.D. Mich. 1989) (individual liability of corporate officers based on "knowledge, responsibility, opportunity, control and involvement in the disposal process"); *United States v. Fleet Factors Corp.* 724 F.Supp. 955, 961 (S.D. Ga. 1988) (individual liability based on fact that defendants "actively managed the facility"); *United States v. Conservation Chemical*, 628 F.Supp. 391, 420 (W.D. Mo. 1985) (individual liability based on a "high degree of personal involvement in the operation and the decision-making process"); *United States v. Carolawn Co.*, 21 E.R.C. 2124, 2131 (D.S.C. 1984) (individual liability of "corporate officials ... who are responsible for the day-to-day operations of a hazardous waste disposal business"); *Kelly v. Thomas Solvent Co.*, 727 F.Supp. 1554, 1562 (W.D. Mich. 1989) (court should look to, among other things, authority to control waste handling practices, responsibility undertaken for same, and liability requires "more than mere status as a corporate officer or director").

Finally, Riverside contends that the Fifth Circuit's decision contradicts its other holdings on this issue. The cases cited by Riverside, however, stand only for the proposition, affirmed by the Fifth Circuit in this case, that a corporate officer who takes part in the commission of a tort of the corporation may be held individually liable along with the corporation. *See Mozingo v. Correct Mfg. Corp.*, 952 F.2d 168, 173 (5th Cir. 1985); *Shingleton v. Armour Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980). Similarly, Riverside's reliance on *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972), is somewhat puzzling. In *Mobil*, the court addressed only the issue of whether a corporation was a "person in charge" within the meaning of the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*:

> We conclude that an owner-operator [Mobil Oil] is "in charge" of his facility within the meaning of [the WPCA]. It necessarily follows that a corporate owner, a "person" within the statutory definition, is a "person in charge" of the facilities it owns and operates....

464 F.2d at 1127. *Mobil* did not address individual liability of corporate officers, nor does it provide any guidance on this issue. Thus, Riverside's reliance on this case is misplaced.

As the foregoing discussion indicates, the Fifth Circuit's holding is entirely consistent with the holdings of other circuits and the district courts. The Fifth Circuit does not by its ruling immunize corporate officers from liability under CERCLA, but rather correctly applies traditional tenets of corporate law in choosing not to hold officers and directors liable unless the particular defendant has actively participated in the tort of the corporation.

Riverside's claim that Prescott is an owner or operator under CERCLA takes a leap that neither the facts nor the law support. Prescott never held title to the Plant, the land, the buildings, the equipment or any of the materials utilized there. *See* Affidavit of von Dohlen, Resp. App. A, at para. 16; Record at p. 89; and Affidavit of Prescott, Resp. App. B at para. 10; Record at p. 94. It was clearly owned and operated by IBP, which employed the 220 to 240 workers at the Plant and which also employed the five levels of management involved in running the Plant. "Management" was made up of foremen who reported to production superintendents, who, in turn, reported to the Production Manager, who, in turn, reported to the Vice President of Manufacturing, Mr. Ray Plauche ("Plauche"). *See* Resp. App. A, paras. 6 and 8; Record at

pp. 85 and 86.

Von Dohlen held the title of President and functioned as chief executive officer of IBP from its inception in March of 1981 until he was replaced as chief executive officer by Timothy Eames ("Eames") in December of 1982. *See* Affidavit of von Dohlen, Resp. App. A at para. 7; Record at pp. 85-86. No one associated with IBP, including von Dohlen and Prescott, had experience in the manufacture of asbestos products. For that reason, the Plant manager for National Gypsum for a number of years, Plauche, was retained as Vice President of Manufacturing of IBP. He was in charge of the day-to-day running of the Plant, living in New Orleans and working at the Plant daily. Resp. App. A, paras. 5 and 11; Record at pp. 85 and 87. Von Dohlen resided in New Jersey but spent 40 percent of his time in New Orleans. Resp. App. A at paras. 1 and 9; Record at pp. 84 and 86.

Various officers handled environmental matters and reported to Plauche. IBP at all times had officers and staff who were knowledgeable and experienced regarding environmental matters who operated the Plant just as it had been operated for decades by National Gypsum. Resp. App. A, paras. 11, 13 and 15; Record at pp. 87-89.

Prescott was a shareholder and served as Chairman of the Board of Directors. He was never an employee of IBP and Riverside has not and cannot point to *any* evidence that he played any role in the day-to-day running of the Plant. Nor did Prescott ever have any responsibility for or participate in either the cleanup or disposal of any waste, whether hazardous or not. Affidavit of Prescott, Resp. App. B at paras. 4-8; Record at pp. 92-93.

Based on the undisputed facts of this case, the Fifth

Circuit found that Prescott had not actively participated in the management of the Plant or any violations of CERCLA.[1] As the court succinctly noted in its *per curiam* opinion:

> The plaintiffs in this case have failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. The record clearly indicates that Prescott spent very little time at the asbestos plant, and no evidence has been presented to indicate that such visits would have provided Prescott with the opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products. Prescott lived in New York and only visited New Orleans two to four times a year, and his participation in plant operations were limited to reviewing financial statements and attending meetings of the officers where he consulted with von Dohlen and others.

Riverside, 931 F.2d at 330; Riverside App. at p. 16. Under either the Eighth Circuit test in *NEPACCO* or the Second Circuit test in *Shore Realty*, these undisputed facts would lead to results identical to those obtained in the Fifth Circuit.

CONCLUSION

The Fifth Circuit has not granted blanket immunity to corporate officers, as Riverside mistakenly contends. Moreover, the alleged conflict between the Circuits does not exist. The Fifth Circuit has followed the long-standing

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[1] At page 9 of its brief, Riverside describes Prescott as an "active manager" of IBP. As the facts show, and as the District Court and Fifth Circuit held, that characterization is wrong.

rule, uniform throughout the Circuits, that individual liability may be imposed on corporate officers, directors or shareholders who actively participate in the tort of the corporation. The issue in this case, and in the other cases like it, is not one of law but of fact. The four judges that have reviewed the record thus far have unanimously agreed that Prescott was not an active participant in the alleged CERCLA violations of IBP, and thus, he was correctly dismissed from this suit. Accordingly, Riverside's petition for writ of certiorari should be denied.

Respectfully submitted,

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T. Gene Prescott

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 1991, a copy of this pleading has been served upon Scott R. Bickford and John R. Martzell of Martzell, Thomas & Bickford, 338 Lafayette Street, New Orleans, Louisiana 70130, telephone (504) 581-9065, attorneys for Petitioners, via U.S. mail, correct postage prepaid. All parties required to be served have been served.

RALPH S. HUBBARD III

18/11/D/05

RESP. APP. A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVELOPMENT CORPORATION AND RIVERSIDE MARKET LIMITED PARTNERSHIP	*	CIVIL ACTION
Versus	*	NO. 88-5317
INTERNATIONAL BUILDING PRODUCTS, INC., GERARD N. VON DOHLEN and T. GENE PRESCOTT	*	SECTION L
	*	MAGISTRATE 6

* * * * * * *

AFFIDAVIT

STATE OF New Jersey

COUNTY OF Bergen

BEFORE ME, Notary Public in and for the County and State aforesaid, personally came and appeared.

Gerard N. von Dohlen

who, upon being duly sworn, deposed and said that:

1. He resides in Tenafly, New Jersey and has a business address in Port Newark, New Jersey. He has never been a resident of New Orleans.

2. He was an investor in International Building Products, Inc. ("IBP"), a defendant named in the above captioned case, during the time that IBP owned a manufacturing plant located in the city of New Orleans. He at one time owned 15% of the company stock and currently own none.

3. IBP purchased the manufacturing plant located in the City of New Orleans on Tchoupitoulas Street (the "Plant") from National Gypsum on March 11, 1981 which Plant is the subject of the captioned lawsuit. The Plant ceased operations in approximately March of 1985 and the Plant site was purchased by one of the plaintiffs, Riverside Market Development Corporation, on November 7, 1985.

4. Prior to the purchase by IBP, the Plant had been operated for approximately 53 years, 28 years by National Gypsum Company and 25 years by R.J. Dorn Corporation and Asbestone Corporation. During its entire existence, the Plant was used to manufacture asbestos cement products which were shingles, siding and flat sheets.

5. No one associated with IBP had any experience in dealing with asbestos. Thus, the entire National Gypsum work force located at the Plant was hired by IBP to continue operation of the Plant including Mr. Ray Plauche, who had been in charge of the operations of the Plant for a number of years when it was owned by National Gypsum Company.

6. While the Plant was in operation by IBP, it employed between 220 and 240 people.

7. From March of 1981 until approximately March of 1985 the Plant was owned and operated by IBP. IBP continued to own the Plant after operations ceased until it was sold in November, 1985. Mr. von Dohlen held the title of

Chief Executive Officer for the 20 month period from March of 1981 until December of 1983 at which time Mr. Timothy Eames became the Chief Executive Officer. During his tenure as Chief Executive Officer, he actually functioned as Marketing Vice President. In that capacity, he supervised the marketing of the final product rather than day to day operations in the manufacturing of that product. He has been a member of the Board and President since IBP's inception.

8. The actual operation of machinery at the Plant was supervised by unionized employees called machine tenders. These employees reported to foremen of which there were approximately 12. These foreman, in turn, reported to production superintendents. The Plant had two Production Superintendents, one responsible for mill, or wet machine operations, and one responsible for finishing and shipping. These two individuals, as well as the Plant Engineer, reported to the Production Manager who in turn reported to the Vice President of Manufacturing, Mr. Plauche. Also reporting to the Vice President of Manufacturing were (1) the Personnel and Safety Director; (2) the Quality Control Supervisor; and (3) the Production Engineer. The Vice President of Manufacturing in turn reported to the Chief Executive Officer. Consequently, five (5) levels of management separated the Chief Executive Officer from the actual operation of the equipment at the Plant.

9. From 1981 through December of 1983 he spent less than 40% of his time in the City of New Orleans.

10. Since December of 1983, Mr. von Dohlen has had virtually nothing to do with IBP. He has been in the City of New Orleans only twice since December of 1983. On one occasion he came to attend the sale of the Plant site to

Riverside Market Development Corporation in November of 1985. On another occasion he was in New Orleans to meet with Mr. Gordon Kolb, a representative of the purchaser, in May of 1985.

11. The officers of IBP who were responsible for environmental matters and dealt with the environmental agencies such as the United States Environmental Protection Agency ("EPA") and the Louisiana Department of Environmental Quality ("DEQ") reported directly to Mr. Plauche, Vice President of Manufacturing. Mr. Plauche and those persons reporting to him dealt directly with all of the regulatory agencies on behalf of IBP as they had during National Gypsum's tenure. Mr. Plauche was in charge of running the Plant on a day to day basis, and lived in New Orleans and worked daily at the Plant site.

12. During his tenure with IBP, Mr. von Dohlen was unaware of any environmental violations. Throughout his tenure, the Plant was an operating entity subject to OSHA regulations. Operations did not cease until some 16 months after he was replaced as Chief Executive Officer by Mr. Eames.

13. At all times during the operations of the Plant, IBP had sufficient officers and staff who were experienced and knowledgeable regarding environmental matters and who continued to operate the Plant as it had been operated for decades under National Gypsum Company.

14. Since its incorporation, IBP has been a separate legal entity responsible for its own obligations. At no time has it been used as the alter ego of its shareholders, officers or directors. This is demonstrated by the following facts:

(a) Throughout the time the Plant was owned by IBP, IBP was audited by the "Big Eight" accounting firm of Touche Ross;

(b) Corporate and officer, director and shareholder funds have never been co-mingled;

(c) IBP always maintained separate bank accounts from those of its shareholders, officers and directors;

(d) IBP always maintained separate bookkeeping records from those of any of its shareholders, officers or directors;

(e) Shareholders and directors meetings were held on regular basis;

(f) IBP was adequately capitalized and only closed its Plant in New Orleans due to a nationwide trend of reduction in purchase of materials containing asbestos;

(g) IBP retained and paid its own employees and maintained its own insurance and workmen's compensation program;

(h) IBP always filed its own tax returns.

15. He did not participate in any way in the cleanup of the Plant or disposal of any waste products from the Plant, whether hazardous or not during the operation of the Plant or after operations ceased. He was not present in New Orleans during the cleanup after operations ceased and was not the Chief Executive Officer at that time. Corporate officers, under the direction of Ray Plauche, Ken

Lacy and Timothy Eames, supervised IBP employees handling such functions.

16. At no time did he or any other officer, director or shareholder personally own the Plant, the land where it was located, or any materials or equipment located at the Plant.

17. At no time has he owned or operated any facility at which hazardous substances were disposed.

18. At no time has he by contract, agreement or otherwise arranged for disposal or treatment or arranged with a transporter for the transport for disposal or treatment of hazardous substances of any kind or nature.

19. At no time has he accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or any other site.

20. At no time has he owned or operated any building, structure, installation, equipment, pipe or pipeline, well pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel or aircraft or any site or area where a hazardous substance has been deposited, stored, disposed of or placed or otherwise come to be located.

21. He has never generated or been involved in the generation of a hazardous substance which was subsequently disposed of or discharged.

22. He has never transported a hazardous substance which was disposed of or discharged.

23. He has never disposed of or discharged a hazardous substance.

24. He has never contracted with a person for transportation or disposal of any hazardous substance.

25. He has never received a demand from any state or federal agency, including, without limitation, the Secretary of the Department of Environmental Quality for the State of Louisiana, relating to the discharge of hazardous waste in any fashion, including without limitation any demand notifying him that he is or may be liable for disposal of hazardous waste or requiring that he undertake remedial actions at any site in accordance with a plan approved by a state or federal official or agency or pay the cost of any remedial action which may be taken by said federal or state official or agency. He has never been sued by the Louisiana Department of Environmental Quality. He has never received a demand such as that contemplated by LA R.S.30:2275.

26. He is familiar with the records of IBP and, to the best of his knowledge, information and belief, IBP never received a demand from the Secretary of the Louisiana Department of Environmental Quality (nor has it been sued by said Secretary) seeking to have IBP undertake remedial action in compliance with the demand and is approved by said Secretary in order to accomplish the cleanups allegedly engaged in by the plaintiff in 1986 at the Plant. IBP has never received a demand such as that contemplated by LA R.S.30:2275.

/s/ Gerard N. von Dohlen

Gerard N. von Dohlen

SWORN TO AND SUBSCRIBED
before me this 5 day
of March, 1990.

/s/ Florence Ragazzo

Notary Public

RESP. APP. B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVELOPMENT CORPORATION AND RIVERSIDE MARKET LIMITED PARTNERSHIP	*	CIVIL ACTION
versus	*	NO. 88-5317
INTERNATIONAL BUILDING PRODUCTS, INC., GERARD N. von DOHLEN and T. GENE PRESCOTT	*	SECTION M
	*	MAGISTRATE 2

* * * * *

AFFIDAVIT

STATE OF New Jersey

COUNTY OF Bergen

BEFORE ME, Notary Public in and for the County and State aforesaid, personally came and appeared

T. GENE PRESCOTT

who, upon being duly sworn, deposed and said that:

1. He resides in New York City and has a business address in Port Newark, New Jersey.

2. He has never lived or worked in the State of Louisiana.

3. He is an investor in International Building Products, Inc. ("IBP"), a defendant named in the above-captioned case.

4. At no time did he participate in the operation of the manufacturing plant located in the City of New Orleans on Tchoupitoulas Street which is the subject of the captioned lawsuit (the "Plant"). The Plant was owned by IBP from March 11, 1981 through November 7, 1984. His role in connection with IBP has at all times been that of a passive investor. There are presently four shareholders of IBP and he owns 65 percent of the stock outstanding.

5. He was never an officer of IBP, merely holding the title of Chairman of the Board since IBP's incorporation.

6. He has never had any day-to-day responsibilities regarding IBP. He functioned more like someone who owns stock in a New York Stock Exchange company, reading the financial statements of IBP and attending board meetings in Port Newark, New Jersey.

7. He had no responsibility for and did not participate in any contracts, negotiations or contracts with firms which supplied asbestos to the Plant in New Orleans. Corporate officers and IBP employees handled such functions.

8. He had no responsibility for and did not participate in any way in the operation of the Plant itself or the cleanup or disposal of any waste products from the Plant, whether hazardous or not. Corporate officers and IBP employees handled such functions.

9. He visited the Plant at most one to three times a year from 1981-1984. Those visits did not relate to operation of the Plant, but rather were to attend the annual Christmas party; to attend, together with numerous IBP personnel and officers, a meeting of an erectors' association, some of whose members used products from the Plant and to visit briefly with executive personnel.

10. At no time did he personally own the Plant or the land where it was located.

11. At no time has he owned or operated any facility at which hazardous substances were disposed.

12. At no time has he by contract, agreement or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment of hazardous substances of any nature or kind.

13. At no time has he accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or any other site.

14. At no time has he owned or operated any building, structure, installation, equipment, pipe or pipeline, well pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel or aircraft or any site or area where a hazardous substance has been deposited, stored, disposed of or placed or otherwise come to be located.

15. He has never generated or been involved in the generation of a hazardous substance which was subsequently disposed of or discharged.

16. He has never transported a hazardous substance

which was disposed of or discharged.

17. He has never disposed of or discharged a hazardous substance.

18. He has never contracted with a person for transportation or disposal of any hazardous substances.

19. He has never received a demand from any state or federal official or agency, including, without limitation, the Secretary of the Department of Environmental Quality for the State of Louisiana, relating to the discharge of hazardous waste in any fashion, including without limitation any demand notifying him that he is or may be liable for disposal of hazardous waste or requiring that he undertake remedial actions at any site in accordance with a plan approved by a state or federal official or agency or pay the cost of any remedial action which may be taken by said federal or state official or agency. He has never been sued by the Louisiana Department of Environmental Quality. He has never received a demand such as that contemplated by LA R.S.30:2275.

/s/ T. Gene Prescott

T. Gene Prescott

SWORN TO AND SUBSCRIBED
before me this 5 day
of March, 1990.

/s/ Florence Ragazzo

Notary Public